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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 398

WILL PARKS CLAY and MATTIE BELL ANDERSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit.

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Macon, Georgia,
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WILL PARKS CLAY and MATTIE BELL ANDERSON,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioners, Will Parks Clay and Mattie Bell Anderson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on the 29th day of June, 1957.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit (R. 450-465) has not been reported and is reproduced in the Appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 29th day of June, 1957 (R. 466). Petitioners filed a petition for rehearing on the 19th day of July, 1957 (R. 467-470), which, after consideration, was denied by the Court of Appeals without opinion on the 5th day of August, 1957, Chief Judge Hutcheson dissenting (R. 479). The jurisdiction of this Court is invoked under 28 U. S. C., 1254 (1).

QUESTIONS PRESENTED.

On June 21, 1955, United States Treasury agents obtained a warrant (R. 11-14) from the United States Commissioner at Macon, Middle District of Georgia, authorizing them to search the home of Petitioners, known as 140 Morton Avenue, Athens, Georgia, for lottery evidence. On that day they executed the warrant, arrested Petitioner Clay on the premises, seizing from him some lottery tickets and thereupon forcibly entered Petitioners' home, searched it and seized additional evidence relating to a lottery (R. 29-45, 58-65). On February 16, 1956, a grand jury returned an indictment in three counts, the first count charging Petitioners and others with conspiracy to violate sections of the Internal Revenue Code, which prohibit wilful attempts to evade and defeat the payment of the wagering occupational tax and the Federal excise tax imposed on wagers. Counts 2 and 3 charged Petitioner Clay alone with the substantive offenses of wilfully attempting to evade and defeat the payment of such taxes (R. 2-7).

Petitioners each filed timely motions under Rule 41 (e) of the Federal Rules of Criminal Procedure for return and suppression as evidence of the property seized by the Federal officers under the search warrant which they exe-

cuted. After a hearing, the District Court overruled each of the motions on April 19, 1956 (R. 20-28). Thereafter, Petitioners were tried and convicted on the indictment, the property so seized being admitted in evidence against them (R. 8-10). On appeal, the Court of Appeals for the Fifth Circuit, in a two to one decision, affirmed the judgments of conviction (R. 466). The questions presented are:

1. Was the search warant used by the officers to enter and search Petitioner's home, and which the Court of Appeals said authorized the arrest and search of the person of Petitioner Clay, while he was on the premises of his home, valid as having been issued in accord with the Fourth Amendment to the Constitution of the United States and Rule 41 of the Rules of Criminal Procedure?

2. Is a search warrant issued by a United States Commissioner valid wherein he stated in effect that his finding of probable cause for its issuance is based at least in part on the affidavit of an officer who never appeared before the Commissioner and who never made an affidavit stating the facts and conclusions attributed to him by the Commissioner?

3. Is a warrant to search a private dwelling valid where no person appearing before the issuing magistrate has made affidavit categorically stating that he has reason to believe that a crime is being committed on the premises to be searched or that incriminating evidence is being kept or concealed on such premises?

4. Does the affidavit of an officer made on June 21, 1955, to support the issuance of a warrant to search Petitioners' home for lottery paraphernalia, disclosing that on and before, but not after, June 6, 1955, neither of Petitioners had purchased the special occupational stamp required of lottery operators, show, without more in that connection, probable cause for believing that Petitioners had not pur-

chased such stamp on or before June 21, 1955, the date on which the warrant was issued?

5. Was the Court below correct in holding that the United States Commissioner, who issued the search warrant for Petitioners' home, could properly accord substance and weight to an unsigned and unsworn document (Completed basic affidavit form for search warrant) in determining the existence of probable cause merely because such unsigned document was physically attached to three other affidavits made before him?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED.

The Fourth Amendment to the Constitution of the United States and the pertinent provisions of Rule 41 (c) of the Federal Rules of Criminal Procedure are set forth in the Appendix.

STATEMENT.

On June 21, 1955, Richard E. Lewis, William A. Morris and William A. Pair, all Special Agents, Intelligence Division, Internal Revenue Service, United States Treasury Department, appeared before United States Commissioner Walter F. Doyle at Macon in the Middle District of Georgia and made affidavits for issuance of a warrant to search the premises known as 140 Morton Avenue, Athens, Georgia, which the record discloses was Petitioners' home (R. 16-20). In neither of these affidavits is it specifically stated that the affiant had reason to believe that a crime was being committed on the premises of Petitioners' home, or that lottery paraphernalia was being concealed therein. The affidavit of Richard E. Lewis shows that he had observed Petitioner Clay on two occasions carry into his house a paper bag of the sort that is commonly used by lottery

operators in carrying lottery paraphernalia; that Clay had a reputation for engaging in the business of accepting wagers for profit and that he was known to his neighbors as "Mr. Anderson", an alias (R. 16-17).

The affidavit of Agent William A. Morris merely recites that on June 6, 1955, he searched the records in the office of the District Director of Internal Revenue and found that Petitioners had not obtained on that day or at any time prior thereto "a special occupational stamp" for the fiscal year ending June 30, 1955. He also stated that telephone company records showed that within six months prior to June 20, 1955, a number of long distance calls had been made from the 140 Morton Avenue house to known or reputed lottery operators (R. 18).

Agent Pair stated in his affidavit that he had been reliably informed that Petitioner Clay was carrying on gambling activities in the home of Petitioner Anderson; that he had trailed Clay's car to the 140 Morton Avenue address and found that the telephone in the house was listed in the name of Mrs. Anderson's mother. In addition, he stated that on two previous occasions he had arrested Clay and had both times found lottery equipment on his person (R. 18-20).

There was attached to these three affidavits an affidavit of Fleming G. duBignon, a special agent of the Internal Revenue Service, which had been made on June 20, 1955, before James M. Sutherland, another special agent of the Internal Revenue Service in the Northern District of Georgia at Atlanta, Georgia. duBignon stated in this affidavit that he had personally checked records in the office of the District Director of the Internal Revenue Service and found that no occupational tax stamp had been purchased by either of petitioners. duBignon did not say in his affidavit when this record search was made by him (R. 15-16).

These four affidavits were attached to an unsigned document entitled "Affidavit for Search Warrant", on which the Commissioner entered his jurat. The unsigned document is in the usual form of a basic affidavit for a search warrant, and indicates that the would-be affiant had been sworn and under oath stated that he had reason to believe that there was being concealed lottery paraphernalia in the premises at 140 Morton Avenue, Athens, Georgia (R. 14-15). All of these documents were attached to the Commissioner's search warrant, in which the Commissioner states (R. 11-12), that Pair, Morris and Lewis had made affidavits before him and that "an affidavit having been made by F. G. duBignon that he has reason to believe that on the premises known as 140 Morton Avenue, Athens, Georgia . . . there is now being concealed certain property; namely, books, records, papers, documents and memorandum, relating to the business of accepting wagers by a person or persons liable for the payment of the special tax provided for and imposed by Sections 4411 and 4412 (c) I. R. C. of 1954, which has not been paid, all in violation of Section 7203, I. R. C. of 1954. . . ."

On this showing the Commissioner determined that probable cause existed for issuance of the warrant to search Petitioners' home.

Using the warrant so issued, the officers proceeded to 140 Morton Avenue, Athens, Georgia, arrested Petitioner Clay on the front porch of the house, seizing from him lottery evidence, forcibly entered the house, searched it and therein seized all of the incriminating evidence used against Petitioners on the trial of the case, and which is listed on the officers' return upon the warrant (R. 12-14), plus other property unrelated to a lottery, including life insurance policies and money.

Petitioners timely filed their respective motions for return of the property so seized and the suppression of it

as evidence against them. These motions were overruled by the District Court, and Petitioners were thereafter tried and convicted, the evidence so seized being used against them (R. 20-28; 341-345).

On appeal the Court of Appeals for the Fifth Circuit apparently agreed with Petitioners that the affidavit of Agent duBignon, made in Atlanta, Georgia, before another special agent of the Internal Revenue Service, was of no effect whatever, since it was not made in person before the Commissioner. **(Davis et al. v. United States [C. A. 5], 35 F. [2] 957.)**

However, the majority of the court below held that the affidavits executed by Agents Lewis, Morris and Paif, and the unsigned document entitled "Affidavit for Search Warrant" to which these three affidavits were attached should all be considered together, and that, if so, the unsigned document became a part of the other three executed affidavits which in toto sufficiently established the grounds for the Commissioner's action in issuing his search warrant. It held the fact of no signature on the "basic affidavit" was immaterial. The majority afforded this novel and, so far as we can determine, unprecedented treatment to a blank document on the purported authority of **Gregory v. United States (C. A. 5), 237 F. (2) 727**, saying that the "Rule of Reason" stated in that case required a finding that the absence of any signature on the "Affidavit for Search Warrant" document was immaterial. However, Chief Judge Hutcheson of the Court of Appeals, who dissented, pointed out that the Commissioner apparently treated the unsigned document, which was almost completely embodied by the Commissioner in his search warrant, as signed and sworn to, since the Commissioner's jurat was attached to it. Judge Hutcheson held that since this affidavit was neither signed nor sworn to, and subdivision (c) of Rule 41 of the Federal Rules of Criminal Procedure requires that a "warrant shall issue only on

an affidavit sworn to before the Judge or Commissioner and establishing the grounds for the warrant" he was of the opinion that the search warrant was carelessly, improvidently and unlawfully issued, and that the judgment of conviction as to both Petitioners should be reversed because of the failure of the trial court to quash the warrant and suppress the evidence obtained by its use (R. 462-465).

REASONS FOR GRANTING THE WRIT.

1. The decision below should be reviewed because the Court of Appeals in a two to one decision has so far sanctioned a departure from the accepted and usual course of proceedings before a magistrate for issuing search warrants as to call for the exercise of this Court's power of supervision. Most recently, this Court, in **Rea v. United States, 350 U. S. 214, 100 L. Ed. 233, 76 S. Ct. 292,** granted a petition for certiorari in order to exercise its supervisory powers over federal law enforcement agencies.

The majority opinion below permits a magistrate to accord substance and real effect to an unsigned and unsworn document, which, on its face, purports to be a basic affidavit for search warrant. The affidavits of Agents Morris, Lewis and Pair were the only ones which were made in person by the affiants before the Commissioner who issued the warrant. The affidavit of Agent Fleming G. duBignon was made the day before the warrant was issued before another special agent of the Internal Revenue Service, and not before the Commissioner. The Court of Appeals evidently agrees with our contention that the duBignon affidavit is of no force whatever. **Davis et al. v. United States (C. A. 5), 35 F. (2) 957.** The affidavits of the officers who did appear before the Commissioner relate certain facts which are so disconnected as to make it apparent that these three affidavits alone were insuffi-

cient to show probable cause for issuance of the search warrant. This the Commissioner apparently conceded, and the Court below, in effect, held.

In his warrant the Commissioner recites that the three officers who actually appeared in person before him made affidavits, but he recites further that Fleming G. duBignon made an affidavit that he, duBignon, had reason to believe that on the premises to be searched there were concealed books, records, papers, etc., relating to the business of accepting wagers. Fleming G. duBignon did not appear before the Commissioner and made no affidavit saying he had reason to believe that such books and records were being so concealed. The unsigned and unsworn affidavit, therefore, is obviously the affidavit which was prepared for duBignon's signature. It was not signed because he did not appear. It was only on the basis of the proposed affidavit of duBignon together with the other three affidavits, that the Commissioner issued the warrant. The majority of the Court of Appeals sanctioned this procedure by holding, in effect, that the three properly executed affidavits of Agents Morris, Lewis and Pair, **together with the first document to which they were attached** (unsigned and unsworn affidavit for a search warrant), all together sufficiently established the grounds for issuing the warrant and that therefore it was immaterial whether agent duBignon's proposed affidavit was unsigned because it became a part of the three signed affidavits.

The procedure followed by the Commissioner in issuing a warrant for the search of a home in part on the basis of what was contained in an unsigned and unsworn affidavit which apparently was to have been signed by a person who did not appear before him, would seem to be a radical departure from the strict requirements of the Fourth Amendment and Rule 41 (*c*) of the Federal Rules of Criminal Procedure.

Such a procedure affords a magistrate the right in search warrant cases to base a finding of probable cause on virtually anything not contained in an affidavit signed and sworn to before him. He might prepare a memorandum based on information from any source, attach it to and make it a part of affidavits, which in themselves fall short of showing probable cause, but when considered with what is said in his memorandum would show probable cause; thus, if such a practice were condoned by this Court, the protection afforded by the Fourth Amendment would be lost.

A rule of procedure permitting such laxity, if adopted, would constitute a far reaching departure from the accepted practice which requires a commissioner to exercise scrupulous care to insure strict compliance with the mandate of the Fourth Amendment to the Constitution and Rule 41 (c) of the Federal Rules of Criminal Procedure. **Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. Ed. 374, 382, 51 S. Ct. 153; Murby v. United States (C. A. 1), 293 F. 849; Grau v. United States, 287 U. S. 124, 77 L. Ed. 212, 53 S. Ct. 38.**

2. (a) This Court should exercise its discretionary jurisdiction and review the decision below because an important Federal question has been decided in a way which, we believe, is in conflict with applicable decisions of this Court. The Court of Appeals has sanctioned the use by the Commissioner of an unsigned document coupled with affidavits which are signed in making his over-all determination of the existence of probable cause for issuance of a warrant to search a private dwelling. Such a ruling, we think, is contrary to the broad principles announced by this Court in the case of **Go-Bart Importing Co. v. United States**, supra, where it is said that the Fourth Amendment to the Constitution prevents the issuance of search warrants on loose, vague or doubtful bases of fact, and where it is also held that the Amendment is to be

liberally construed "lest there be impairment of the rights for the protection of which it was adopted." Also, the ruling of the Court below is hardly consistent with the following proposition stated in **Sgro v. United States, 287 U. S. 206, 77 L. Ed. 260, 53 S. Ct. 157:**

> "The proceeding by search warrant is a drastic one. Its abuse lead to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual."

A liberal construction of the Fourth Amendment and Rule 41 (c) of the Federal Rules of Criminal Procedure favoring the individual obviously would not permit a magistrate to issue a warrant to search a private dwelling where he has considered, at least in part, matter contained in an unsigned and unsworn document, in making his determination of probable cause. Moreover, the magistrate's warrant in this case states categorically that F. G. duBignon had appeared before him and made an affidavit stating that he had reason to believe that certain lottery paraphernalia was being concealed in the premises to be searched, while in truth, duBignon had made no appearance before the Commissioner and had made no affidavit before any person to that effect.

In reaching its conclusion that the Commissioner could properly consider the unsigned document together with the signed affidavits, the Court of Appeals relied on its ruling in **Gregory v. United States (C. A. 5), 237 F. (2) 727.** In that case the Court of Appeals applied a standard of reasonableness in interpreting the language contained in a search warrant. No question was involved as to what matters the Commissioner could consider in determining the existence of probable cause for issuance of the warrant. Thus, the "rule of reason" relied on by the Court below for sanctioning the Commissioner's use in this case of an unsigned and unsworn document in making his finding of

probable cause, has no application whatever to the situation here involved.

2. (b) Section 4411, Title 26, United States Code, renders persons engaged in the business of accepting wagers or engaged in the business of conducting a lottery, liable for the payment of a special occupational tax. Gambling businesses may be forbidden by state law, but are not prohibited by Act of Congress. It is only through the licensing and taxing requirement that the Federal Government exercises jurisdiction over such businesses. **United States v. Office No. 508, Ricou-Brewster Building (D. C., W. D., La.), 119 Fed. Supp. 24, 28.** Accordingly, the fact of non-registration and non-payment of the occupational tax is an essential element of proof required before a Commissioner on an application for a warrant to search a private home in which it is alleged that lottery paraphernalia is concealed, in violation of Acts of Congress taxing lottery businesses. Proof of such non-payment as of the time the warrant is issued must be made. This is implicit from the decision of this Court in **Sgro v. United States**, supra. The statement of Justice McReynolds, separately concurring in that case, is in pertinent part as follows:

> "The statutes require that a warrant to search for intoxicating liquors shall rest upon duly established probable cause to believe that **at the time it issues**, the liquor is unlawfully possessed. The supporting affidavit must relate to facts which tend to show an unlawful situation actually or probably existing **at the moment.**" (Emphasis supplied.)

Rule 41 (c) of the Federal Rules of Criminal Procedure, which is a mere restatement of existing law, leaves no room for a different interpretation. Agent duBignon's affidavit which was made in Atlanta, Georgia, one day before the officers appeared before the Commissioner in Macon to obtain the warrant in this case, must be disregarded because it was not made before the Commissioner.

Davis et al. v. United States (C. A. 5), 35 F. (2) 957. Thus, the only showing of non-payment of the occupational tax imposed on persons engaged in a lottery is that contained in the affidavit of Agent Morris. In it Morris states he searched the appropriate records on June 6, 1955, fifteen days before he made his affidavit before the Commissioner, and failed to find that petitioners had obtained the required occupational tax stamps. Morris' affidavit, therefore, did not establish that Petitioners were violating a Federal statute as of the time the warrant to search their home was issued by the Commissioner on June 21, 1955. Therefore, the Court of Appeals has decided this case in a way which, we believe, is contrary to the ruling in **Sgro v. United States**, supra.

3. This case ought to be reviewed because the Court below has avoided a decision on an important question of Federal Law which has not been, but should be, squarely decided by this Court. It seems inherently required by the Fourth Amendment and Rule 41 (c) of the Federal Rules of Criminal Procedure that an officer or person applying for a warrant to search a private dwelling should entertain, at the time of his application, a bona fide belief that a Federal crime is being committed in the house or that incriminating evidence is concealed therein. In this case, the Commissioner's warrant states that F. G. duBignon had made oath that he had reason to believe that such was the case. Yet, the record shows that duBignon did not appear before the Commissioner and made no such oath. In addition, none of the remaining affidavits attached to the warrant contain a statement showing that any one of the affiants entertained such a belief.

In **Aderhold v. United States (C. A. 5), 132 F. (2) 858,** it is held:

> "In determining what is probable cause, the question is whether the affiant, at the time of his affidavit, had reason to believe, **and did believe,** from facts

within his knowledge, that the law was being violated on the premises to be searched." (Emphasis supplied.)

The point we wish to emphasize is that no warrant to search a home should issue unless those applying for it have shown the Commissioner that they believe the grounds stated in the application therefor to be true. Certainly, an officer may not arrest and search an individual without a warrant unless he believes that person to be committing a crime and is aware of facts reasonably supporting that belief.

The Court of Appeals did not decide the question raised in this connection. The only affidavits properly executed before the Commissioner were those of Agents Lewis, Morris and Pair. If it is said that from the facts stated in these affidavits the Commissioner could infer that lottery records were being concealed in the house of petitioners, there is yet lacking a basis for finding that the officers in good faith believed that such records were so kept. To find that the officers entertained such belief would require the placing of one inference upon another. This will not do because it is well established that the basis of a presumption must be a fact and not another presumption. **United States v. Lassoff (D. C., W. D., Ky.), 147 Fed. Supp. 944, 948. (Cf. United States v. Ross, 92 U. S. 281, 23 L. ed. 707; United States v. Carr, 132 U. S. 644, 33 L. ed. 483, 10 S. Ct. 182.)**

4. The questions presented by this case are of great and recurring significance in the administration of the criminal laws of the United States. The numerous decisions of this Court, beginning with **Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524,** and continuing through **Kremen v. United States, 353 U. S. . . ., 1 L. Ed. (2) 876, 77 S. Ct. . . .,** all bear witness to the serious nature of the questions involved. We agree with Chief Judge Hutcheson of the Court below in saying that "hard cases make bad

law:" The fact that the search warrant here was issued by the Commissioner at least in part on information furnished not under the pains and penalties of perjury makes this case a peculiarly appropriate one for the exercise of this Court's discretionary power to review.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

Proof of Service.

Georgia, Bibb County.

Personally appeared before me, the undersigned attesting officer, authorized to administer oaths, T. Reese Watkins, who, first being duly sworn, deposes and says that he is an attorney at law, with an office at 914 Persons Building, Macon, Georgia, and that he is one of the attorneys of record for the Petitioners, Will Parks Clay and Mattie

Bell Anderson. Deponent says that he has not been admitted to practice in the Supreme Court of the United States.

Deponent says that on the ..... day of August, 1957, he served copies of the foregoing and attached petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope with sufficient air mail postage prepaid to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the United States, by mailing a copy in a duly addressed envelope with sufficient air mail postage prepaid to Frank O. Evans, Esq., United States Attorney for the Middle District of Georgia, at his office at Room 303, United States Post Office and Court House Building, Macon, Georgia.

Deponent says that this affidavit is made in order to comply with the requirements of Rule 33, Revised Rules of the Supreme Court of the United States.

.....

Sworn to and subscribed before me this ..... day of August, 1957

.....

Notary Public.

APPENDIX.

Opinion.

In the
United States Court of Appeals,
For the Fifth Circuit.

No. 16,385.

Wills Parks Clay and Mattie Bell Anderson,
Appellants,

versus

United States of America,
Appellee.

Appeals From the United States District Court for the Middle District of Georgia.

(June 29, 1957.)

Before Hutcheson, Chief Judge, and Tuttle and Cameron, Circuit Judges.

Hutcheson, Chief Judge: Charged in three counts of an indictment, count one charging him with a conspiracy with Mattie Bell Anderson and others to violate sections of the Internal Revenue Code prohibiting wilfully attempting to evade and defeat the payment of the wagering occupational tax and the federal excise tax imposed on wagers, and counts two and three charging him alone with the substantive offenses of wilfully attempting to evade and defeat the payment of said taxes, and con-

victed on all of these, Clay is here urging: that he was convicted by the use of evidence obtained in violation of the fourth amendment and because thereof the judgment must be reversed.

Mrs. Anderson, who was convicted on the conspiracy count and has appealed, makes the same claim and, in the alternative, claims that the evidence as a whole was insufficient to convict her.

In support of their primary claim, appellants assert: (1) that the search warrant, under authority of which the defendant's house was searched, was not in accordance with, but in violation of, Rule 41,[1] and that no probable

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[1] "Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designated or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., Sec. 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. * * *."

Sec. (e) makes provision for a motion for return of the property and to suppress evidence. Rule 41, Fed. Rules of Criminal Procedure, 18 U. S. C. A.

cause was shown to support its issuance; and (2) that the evidence obtained from appellant Clay at the time of his arrest was taken without a warrant of arrest and without probable cause for arresting him and seizing it.

Appellee, on its part, urges upon us that the search warrant was validly issued upon an adequate showing of probable cause and that the arrest and search of Clay at his residence was also valid. As to the sufficiency of the evidence to convict Mrs. Anderson of conspiracy it insists that the record amply supports the verdict, indeed that any other verdict would have been unreasonable.

A brief statement of the facts[2] will disclose, we think, that there is little if any conflict in them, and that our

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[2] On June 21, 1955, at about 2:40 P. M. Clay drove his automobile into the yard of a dwelling house located at 140 Morton Avenue, Athens, Georgia, which had been purchased by Mrs. Anderson's mother and was lived in by Mrs. Anderson and Mr. Clay. Government agents had been watching the house for some time and, according to plan some of them had been following and some were waiting for Clay to arrive at that address. As soon as he drove into the yard, federal agents drove in behind him. Clay got out of his automobile, in his hand a brown paper bag, the type, according to some of the testimony, which lottery people carry their lottery tickets in, and of a similar description and size to those one of the agents had seen Clay take into the house on the preceding Thursday and Friday.

When Clay saw the three government agents, he started running to the house, and though Agent Pair shouted to him to halt and advised him that he and the other agents were federal officers, Clay continued to run. When he reached the front porch which was only a few steps from his car, he was physically apprehended by Pair and Lewis and, either because of the collision or the ensuing struggle which followed, the brown paper bag Clay was holding split and a smaller bag fell to the porch. Lewis picked the smaller bag up and said, "This is it," and both officers told Clay he was under arrest.

At this particular moment, Morris, another agent who had physical custody of the search warrant which had been procured in anticipation of Clay's arriving at the house, requested Mrs. Anderson to open the front door, advising her that he had a search warrant to search the premises, and upon her refusal, the officers jerked

determination of the question of law arising thereout will be dispositive of the appeal.

The appellants, relying for their attack upon the search warrant upon claimed defects in it and for their attack upon the arrest and search of Clay upon the opinion of this court in **Clay v. United States**, 239 F. (2) 196, holding that a search of his person under the facts there shown was not a reasonable search, insist that the arrest and the search and seizure were invalid, the evidence obtained thereby should have been suppressed, and the conviction obtained by its use must be set aside.

Directing their main attack upon the search warrant, appellants thus state their case against it:

> "The point we wish to emphasize here is that **no person appearing** before the Commissioner stated that

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the screen door open and entered the house. Mrs. Anderson refusing to accept the warrant, Pair laid it on the television set in the living room where she was, and proceeded with his search and seizure.

At the hearing on the motions to suppress, Clay testified that 140 Morton Avenue was his personal residence, that on June 21 when he drove up into the yard, got out of his car, and started to go into the house—and he had a right to go into it—if he had not been arrested he would have entered it. He further testified that when he was at the house he had free run of it, and in effect every room in it was under his custody and control. After the brown bag had been seized from him, Clay was subjected to a perfunctory search and so was the automobile. The officers who produced the search warrant and executed the search and seizure were experienced investigators and they testified fully as to how the operation was conducted. They also testified on the trial: that they had received reliable information to the effect that Clay was operating a lottery and that he was checking up at Athens; that they first determined that he had not complied with the requirements of the wagering tax act and then established a watch over his activities. Having observed him for several days, they procured the search warrant to search the place which, in the affidavit for the search warrant and in his testimony one of them swore was being used as the place of Clay's checking up operations. They waited near the house until Clay arrived before they drove to the premises but when they saw Clay with the paper bag in his hand and running for the house, they apprehended and arrested him.

he had reason to believe that, as the warrant itself states, 'there is now being concealed certain property; namely, books, records, papers, documents and memoranda relating to the business of accepting wagers.' Nothing is said in the four signed affidavits which would lead a reasonably discreet person to believe that any such books, records, etc., were being concealed at the place in question. In other words, there is no fact allegation or statement that the books and records were being concealed in the house, and for this reason alone there was no basis for the issuance of the warrant. Even if such a conclusion had been stated by any one of the affiants there would still be absent from the affidavits such fact statements as would justify a reasonably prudent person in concluding that lottery paraphernalia was, on the 21st day of June, 1955, concealed in the premises by a person or persons engaged in carrying on a lottery business without having first purchased the occupational stamps required by law. In the four affidavits which are signed, only the most loose, vague, doubtful and disconnected facts are stated. * * *"

Thus appellant's attack upon the search warrant reduced to their ultimate substance are: that the affidavits on which it was based did not sufficiently show that lottery records would be found in the house to be searched; that no person appearing before the commissioner, stated under oath that he has reason to believe that there is now being concealed in the premises to be searched certain property, viz., books, papers, records and memoranda relating to the business of accepting wagers, and that nothing was said in the four affidavits which would lead a reasonably discreet person to believe that any such property was being concealed there; that, in short, there is no sworn to fact allegation or statement that books or records or other paraphernalia are being concealed at the

house, and because this is so, there was no basis for the warrant. In further support of their attack, urging upon us that the only papers attached to the search warrant which contained any reference to the fact that described property was being concealed at 140 Morton Avenue, Athens, Georgia, or sought a search warrant to seize it, was in blank and that, of the affidavits, one of them was not taken before the commissioner and the others made no specific statement as to any property being in the residence, they insist that it must be held that the search warrant was invalid and the search of the house was therefore not supported.

The United States, citing numerous cases,[3] presses upon us that in each case involving arrests and searches and seizures, the question for decision is whether the evidence as a whole supports the conclusion of the district judge that the action of the commissioner in issuing the search warrant or the action of the officer in making an arrest was or was not reasonable. It urges in short that there is no hard and fast rule precisely pinpointing what should be said and done in applying for and issuing a search warrant or what facts must appear to justify an arrest and search without a warrant; that in each case the inquiry is, are the facts put forward to support the action impeached in any way and, if not, are they as a whole sufficient to support the view that the conclusion reached and the action taken in accordance with the rule were not unreasonable but reasonable.

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[3] Including: Brinegar v. U. S., 338 U. S. 160; U. S. v. Wreblewski, 105 F. (2) 444; Walker v. U. S., 225 F. (2) 447; Flores v. United States, 234 F. (2) 604; Lowery v. U. S., 161 F. (2) 30; Hysler v. U. S., 86 F. (2) 918; *Dixon v. United States*, 211 F. (2) 547; Clifton v. United States, 224 F. (2) 329; *Cannon v. United States*, 158 F. (2) 953; Kelly v. United States, 61 F. (2) 843; to which may be added United States v. Trujillo, 191 F. (2) 853; Byrd v. U. S., 216 F. (2) 609; Jones v. U. S. (5 Cir.), 6-10-57, ... F. ( ) .....

We find ourselves in general agreement with the position of the United States that the rule of reason applies in the consideration and determination of questions such as those presented here, and the majority is of the opinion for the reasons hereafter stated, that its application requires affirmance of the judgment.

The documents that were before the Commissioner when he issued the search warrant consisted of five papers physically attached. The first of these was a blank unsigned form of affidavit which is here reproduced in full:

"Affidavit for Search Warrant.

"District Court of the United States, Middle District of Georgia, Macon Division.

Commissioner's Docket No. 2
Case No. 532.

United States of America,

vs.

Premises known as 140 Morton Avenue, Athens, Georgia.

Before (Name of Commissioner) Walter F. Doyle, (Address of Commissioner) Macon, Georgia.

The undersigned being duly sworn deposes and says: That he (has reason to believe) on (on the premises known as) 140 Morton Ave., Athens, Georgia, Athens Division, in the Middle District of Georgia, there is now being concealed certain property, namely, (here describe property) books, records, papers, documents and memorandum relating to the business of accepting wagers by a person or persons (here give alleged grounds for search and seizure), liable for the payment of the special tax provided for and imposed by Sections 4411 and 4412a, IRC of 1954,

which has not been paid, all in violation of Section 7203, IRC of 1954.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See attached affidavits.

.....

Signature of Affiant.

.....

Official Title, if Any.

Sworn to before me and subscribed in my presence, June 21, 1955.

Walter F. Doyle,

(Seal) United States Commissioner."

Attached to this paper were four affidavits, one of them sworn to before a special agent of the Internal Revenue Service (and thus of no validity or import in this connection), the other three sworn to before the Commissioner, as required by law, all documents bearing the date June 21, 1955.

Rule 41, quoted above, requires that for the Commissioner to issue a search warrant he must make a determination that "the grounds for the application exist or that there is probable cause to believe that they exist." If the affidavits which conformed to the requirements of the rule were sufficient to support such a determination of probable cause by the Commissioner, neither the trial court nor an appellate court is justified in quashing the warrant as void. In construing the document we must apply the rule of reason. **Gregory v. United States** (5 Cir.), 237 F. (2) 727. If, therefore, the three properly executed affidavits, together with the first document to which they were attached, altogether sufficiently establish the grounds for

issuing the warrant, then it is immaterial that there was no signature on the first document, because it became a part of the other three affidavits.

We must thus determine whether together the affidavits were sufficient to establish the grounds for issuing the warrant. We are satisfied that they were.

From the affidavit of Agent Richard E. Lewis it appeared that appellant Clay had several times been seen carrying into the house in question paper bags of the sort that were commonly used by lottery operators in carrying lottery paraphernalia, that he had a reputation for engaging in the business of accepting wagers for profit, and that he was known to the neighbors as "Mr. Anderson," an alias.

Agent William A. Morris' affidavit recites that from a search of the records of the District Director of Internal Revenue it appeared that up to June 6, 1955, neither Will Parks Clay nor any person named Anderson had obtained the special occupation stamp for the fiscal year ending June 30, 1955, required of lottery operators. It was also cited that telephone company records showed that within the six months preceding June 20, 1955, a number of long distance telephone calls had been made from the 140 Morton Avenue house to known or reputed lottery operators.

Agent William A. Pair in his affidavit swears that he had been reliably informed that appellant Clay was carrying on gambling activities in the home of Mattie Bell Anderson; that he had trailed and traced Clay's car to the 140 Morton Avenue address; that he had determined that its phone was listed in the name of Mrs. Anderson's mother, and that he had twice previously arrested Clay and had both times found lottery equipment on him.

From these three affidavits the Commissioner could well find that the 140 Morton Avenue house was used by the known, but unregistered, gambler, Clay, for his operations,

and that since he had repeatedly been seen carrying packages likely to contain gambling paraphernalia into it, and had apparently made numerous "business" calls from it, it was probable that in the house there could be found "books, records, papers, documents and memorandum relating to the business of accepting wagers by a person" delinquent in his obligation to pay the special tax. Nothing in the affidavits supports appellants' contention that the Commissioner could only have concluded that there was probable cause to expect the presence of the described equipment in the house only at the times that Clay himself was there, nor are any cases cited for the implied proposition that a search warrant may not issue unless there is positive assurance that the property sought is continuously on the suspected premises—as a matter of fact Rule 41 (c) carefully distinguishes the affidavits required for the issuance of a daytime warrant from the positive assertions required for a warrant servable at any time.

There remains the question whether the reference to Agent duBignon's affidavit, which had been improperly signed before another agent rather than before the Commissioner himself, vitiates the otherwise proper warrant. We do not believe that it does. The faulty affidavit recites merely a search of the records of the District Director of Internal Revenue, at an unspecified time, from which it appeared that neither Will Parks Clay, under that name or under any likely alias, nor any known employee of his, nor, in fact, any person in Clarke County, Georgia, had taken out a gambling tax stamp; thus the contents of the affidavit merely duplicate part of the facts recited by Agent Morris.

Furthermore, no case has been cited or found that holds that where the Commissioner refers to improper as well as to proper sources as the bases for his determination of probable cause, and the proper sources are adequate to support that determination, the warrant is still defective.

There is no reason for analogizing the ex parte proceeding before a Commissioner in obtaining a warrant to the finding of fact of the trial court which may be set aside if possibily based in part on improper evidence, for in the latter case each piece of evidence presented to and considered by the court may be objected to by the opposing party and thus the court is warned that reliance on such evidence may be dangerous (or a failure to object waives most possible defects), while in issuing a warrant the Commissioner does not have the benefit of the cautioning guidance by opposing counsel; as the Government points out, Commissioners are not even required to be lawyers. Undoubtedly much that is contained in ex parte statements made to Commissioners to obtain a search or arrest warrant may be technically inadmissible, but if we find that that which was technically correct is sufficient to support the Commissioner's determination that in his opinion probable cause exists, we have no right to set it aside.

Finally, the appellant attacks the propriety of the court's refusal to suppress the evidence which was taken from Clay while standing on the porch of the Anderson house, assuming the search warrant for the premises was adequate. It is quite clear that without reference to the legality of the arrest of Clay, which we need not decide, the officers did have full authority under the search warrant to investigate the contents of the brown paper bag held in Clay's hand while on the front porch of the house. This is clearly within the principles stated in **Harris v. United States**, 331 U. S. 145, and **United States v. Rabinowitz**, 339 U. S. 56.

The judgment of the trial court was without error and should be affirmed.

Speaking for myself alone, though in full agreement with the position of the government and of the majority that the rule of reason applies in the consideration and deter-

mination of the questions presented here, I am unable to agree with the conclusion of the majority that the application of that rule requires an affirmance of the judgment. Because of the fact that the basic "affidavit for search warrant," which the commissioner apparently treated as signed and sworn to [see his jurat on page 15 of the record, and is almost complete embodiment by the commissioner in his search warrant][4] was neither signed nor sworn to, and Subdivision (c) of the rule, note 1, supra, provides that a warrant "shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for the warrant," I am bound to agree with the appellant that the search warrant was carelessly, improvidently and unlawfully issued, and that the judgment as to both defendants must be reversed because of the failure to quash the warrant and suppress the evidence obtained by its use.

This is a hard case and hard cases make bad law, but it seems clear to me that the issuance and use of a search warrant issued at least in part upon information furnished not under the pains and penalties of perjury because the so-called affidavit on which the commissioner mainly relied was not sworn to, has tainted the whole proceedings with

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[4] In the search warrant the commissioner thus states the basis for his action:

"Affidavit having been made before me by William A. Pair, William A. Morris and Richard E. Lewis, and an affidavit having been made by F. G. duBignon, that he (has reason to believe) that (on the premises known as) 140 Morton Avenue, Athens, Georgia, Athens Division in the Middle District of Georgia (here describe property) there is now being concealed certain property, namely, books, records, papers, documents and memorandum relating to the business of accepting wagers by a person, or persons, liable for the payment of the special tax provided for and imposed by Sections 4411 and 4412a, IRC of 1954, which has not been paid, all in violation of Section 7203, IRC of 1954 (here give alleged grounds for search and seizure), and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist. * * *"

illegality. In short, the act of the commissioner in issuing his jurat to an unsworn statement and presuming on the basis of that statement to issue a warrant was usurpation of authority which vitiates and nullifies the searches and seizures relied on to convict the defendants and requires a reversal of the judgment as to Mrs. Anderson because the only evidence against her was obtained by the use of the search warrant, and as to Clay because whether or not the search of his person was under circumstances justifying the use and admission of the evidence found on him, reversal of the judgment as to him was required because of the use of the evidence illegally obtained under the search warrant.

This is not to say with respect to the arrest and search of Clay at the house and his general reliance upon the opinion of this court in 239 F. (2) 196, as affording him safe conduct from molestation in his movements and activities, that the opinion was intended to, or that it can perform that office for him. That decision was based upon its own facts as they were particularly and carefully detailed in the opinion. It applies to and controls the decision of this case and other cases involving him only to the extent that the facts there dealt with reappear in them. If the acts of the officers in applying for, and of the commissioner in issuing, the search warrant had been in accordance with law, I think their actions in arresting Clay and seizing the brown paper bag as he approached the house to be searched would, in view of their having a valid search warrant, have been well within the law. Justice and due process are two-way streets, and, while as the decisions have many times stated, the right of a citizen to be free from unreasonable searches and seizures must be respected and preserved, so must the right of the agents and officers of the United States to make reasonable searches and seizures in the proper enforcement of its laws.

While we did say in the Clay case, supra, that the fact alone that a man is a known gambler does not permit his

arrest and search, we did not mean to, we did not say that that fact when considered with others, including the application for an issuance of a valid search warrant, will not support acts of officers, such as those here shown, done within the law to bring an offender to book. Mr. Clay will do well to remember that while the mills of the law grind slowly, they grind exceeding small, and that the pitcher that goes too often to the well leaves behind either the handle or the spout, and sometimes does not return.

With deference, I dissent from the judgment of affirmance.

Affirmed.

A true copy.

Attest:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit,
By Gilbert F. Ganucheau,
Deputy.

New Orleans, Louisiana.

(Seal)

Constitution of the United States.

Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rules of Criminal Procedure.

Rule 41. Search and Seizure.

"(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."